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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 614

R. A. HOLMAN & CO., INC., *Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent.*

R. A. HOLMAN & CO., INC., and RICHARD A. HOLMAN, *Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

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December 28, 1967

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Petitioners respectfully request this Court to grant rehearing of its order of December 4, 1967, denying the Petition for Writ of Certiorari, and issue a Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled cases.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

In petitioning for certiorari, Petitioners urged, among other things, that the administrative proceeding before the Securities and Exchange Commission was invalid under the Due Process Clause and the Administrative Procedure Act because it was conducted by a retired Hearing Examiner who was serving under a terminable-at-will appointment from the Commission. See Petition for Certiorari, pp. 19-26. The applicable statute, Section 11 of the Administrative Procedure Act, 5 U.S.C. § 1010, clearly provides that:

> "Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission . . . after opportunity for hearing and upon the record thereof."
>
> * * *
>
> "Examiners shall receive compensation prescribed by the [Civil Service] Commission independently of agency recommendations . . . ."

Petitioners pointed out that the Commission itself stated in its opinion that this case:

> "raises a question of first impression, having government-wide implications affecting the validity of all proceedings presided over by retired Hearing Examiners who have been reemployed." *In the Matter of R. A. Holman & Co., Inc., et al.*, 40 SEC 1133, 1134 (1962) (Pet. App. 95a).

In conformity with Rule 58(2) of the Rules of this Court, this Petition for Rehearing presents a substantial ground in support of the Petition not previously presented. Petitioners wish to bring to this Court's

attention, as was not done in the original Petition, the magnitude of the implications of this question for administrative proceedings throughout the federal government.

We are advised that, according to the records of the Civil Service Commission, there are approximately six reemployed annuitants presently serving as Hearing Examiners and there are over 550 Hearing Examiners in the various federal agencies.

Each of these persons is potentially affected by the question raised in this case. The legal right of the reemployed annuitants to continue to sit in proceedings governed by the Administrative Procedure Act will be left unsettled if this Court does not review this case. Challenges to their qualifications in future proceedings are to be anticipated, since the question is too important to go undecided.

As a result, a cloud will hang over all proceedings conducted by reemployed annuitants until it is dispelled by the Court one way or the other. It is therefore critical for this question to be resolved. This case provides an appropriate occasion for this Court to do so. We are presenting only a straightforward question of law: was the Hearing Examiner disqualified by reason of his lack of independence of tenure and compensation from the agency which appointed him?

Moreover, the more than 550 Hearing Examiners who have not yet reached retirement age are also directly affected, as is the conduct of administrative proceedings over which they preside. A number of these are approaching the age of retirement. Whether a Hearing Examiner may be appointed at the discre-

tion of an agency to preside after his retirement may significantly influence Hearing Examiners who are concerned about their financial status upon retirement. In this case, reappointment meant a difference of almost $10,000 a year to the reemployed annuitant.

The potential effect on a Hearing Examiner's judgment resulting from a discretionary power in an agency to reappoint annuitants is obvious: an Examiner concerned with his economic security in old age may be tempted to decide the agency's way during his active service in order to enhance his chances of reappointment after retirement.

As this Court said in *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1929):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

The Hearing Examiner system was created to guarantee independent adjudication in administrative proceedings, an indispensable element of due process, particularly in a prosecutory proceeding like the present which has resulted in the destruction of a valuable going business. The practice of reemploying annuitants is compromising the integrity of the Hearing Examiner system and is subversive of the administrative process.

Too many individuals and too many administrative proceedings are affected by the decision of this question for this Court to leave it in limbo. We submit that a question of such importance should be reviewed by this Court.

CONCLUSION

For the reasons discussed in the Petition for Certiorari and in this Petition for Rehearing, it is respectfully requested that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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December 28, 1967

Certificate of Counsel

I, DANIEL A. REZNECK, an attorney for Petitioners, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and that the Petition is restricted to the grounds specified in Rule 58 of the rules of this Court.

DANIEL A. REZNECK
Counsel for Petitioners